Date: December 27, 1996

Case No.: 95-INA-152

In the Matter of:

PIZZERIA AND RESTAURANT RANDAZZO,
Employer

On Behalf Of:

DENNIS HERNAN PORTILLO,
Alien

Appearance: Marilyn Rosenthal, Esq.
For the Employer/Alien

Before: Huddleston, Holmes, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien

will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 21, 1993, Pizzeria and Restaurant Randazzo ("Employer") filed an application for labor certification to enable Dennis Hernan Portillo ("Alien") to fill the position of Italian Specialty Cook (AF 3-4). The job duties for the position are:

> Prepare meats, vegetables, sauces for cooking: season and cook food according to recipes. Prepare dishes as per house Italian food menu; prepare, season, cook portion and garnish dishes to be served such as: eggplant rolatini, eggplant parm., chicken cutlet parm., veal cutlet parm., etc.

The requirements for the position are two years of experience in the job offered and references.

The CO issued a Notice of Findings on May 19, 1994 (AF 62-64), proposing to deny certification on the grounds that the Employer rejected two U.S. applicants for unlawful, job-related reasons in violation of 20 C.F.R. § 656.21(b)(6). Regarding both U.S. applicants, Belinda Ber and Claude DaCosta, the CO stated that had the Employer contacted them in a timely manner, they may have been available for the job offered. Additionally, the CO found that the Employer told applicant Ber that she was overqualified for the position offered, which is not a lawful, job-related reason for rejection.

Accordingly, the Employer was notified that it had until June 23, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 13, 1994 (AF 65-69), the Employer contended that contact with U.S. applicant Ber was first attempted on February 16, 1994, but was unable to speak with her

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

until February 23, 1996, at which time she advised that she had just obtained a position. The Employer also stated that, "[a]t no time did I refer to her qualifications in relation to the position open in my restaurant." Further, the Employer contended that U.S. applicant DaCosta did not return numerous telephone calls which were made timely until March 2, 1994, at which time he advised that he had already found a job as a chef in a restaurant in Manhattan.

The CO issued the Final Determination on June 29, 1994 (AF 70-72), denying certification because the Employer had unlawfully rejected two qualified U.S. applicants in violation of 20 C.F.R. § 656.21(b)(6).

On July 25, 1994, the Employer requested review of the Denial of Labor Certification (AF 73-80). On November 21, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of a good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

An employer must contact potentially qualified U.S. applicants "as soon as possible" after it receives resumes or applications, so that the applicants will know that the job is clearly open to them. Failure to timely contact the U.S. applicants indicates a failure to recruit in good faith. *Loma Linda Foods, Inc.*, 89-INA-289 (Nov. 26, 1991) (*en banc)*. During the recruitment period, the employer must review applicants, weigh these findings and report to the job service. The "as soon as possible" standard does not embody a specific time limit. It turns on how long an employer requires for a reasonable examination of the applicants' credentials, including but not limited to the following factors: (1) whether the position requires extensive or minimal credentials; (2) whether recruitment is local; and, (3) whether many or only a few persons applied for the position. *Loma Linda Foods, Inc., supra;* see also, *Flamingo Electroplating, Inc.*, 90-INA-495 (Dec. 23, 1991) (stating in dicta that "an employer is required to communicate with potentially qualified domestic applicants as soon as possible -- that is, promptly after only enough time for a reasonable examination of the application -- after receiving their applications.") As such, an unjustified delay in contacting the U.S. applicants, when it was feasible to contact the applicants earlier, is presumed to contribute to an applicant's unavailability. *Creative Cabinet and Store Fixture*, 89-INA-181 (Jan. 24, 1990) (*en banc)*.

In this case, the available position requires only minimal credentials and the Employer received just four resumes (AF 58). In a similar case, it was held that a delay of 21 days was too long to review seven resumes and contact four applicants. *Rancho Liquor,* 90-INA-520 (Dec. 3, 1991). Likewise, a 20 to 33-day delay in contacting U.S. applicants has been held not to constitute a good-faith recruitment effort. *Midamar Corp.*, 90-INA-454 (Mar. 31, 1992). See also, *Jim Abrahams,* 92-INA-381 (July 28, 1993); *Modern Kitchen Designs,* 92-INA-151 (Feb. 28, 1994) (three-week delay in contacting applicants for electrician's position). Therefore, under the facts in this case, we find that the Employer's three-week delay in contacting Ms. Ber[2] and Mr. DaCosta was untimely and does not establish a good-faith effort to recruit qualified U.S. workers.

An employer may avoid the implications of an untimely contact where it provides a reasonable justification for the delay, or a legitimate excuse showing that it did not contribute to the delay, or a combination of reasonable justifications or excuses. *Loma Linda Foods, Inc., supra.* In this case, the Employer made no attempt to justify his delay in the Rebuttal submitted on June 13, 1994 (AF 68-69). However, in his Request for Review, the Employer did attempt to justify his delay in contacting the applicants by making assertions that he was both ill and understaffed during that time. The Employer also argued that he was not aware that he had to contact the applicants within a certain amount of time (AF 79-80).[3] However, the Employer failed to make these arguments in his Rebuttal and evidence first submitted with the Request for Review will not be considered by the Board. *Capriccio's Restaurant,* 90-INA-480 (Jan. 7, 1992); *Kelper International Corp.,* 90-INA-191 (May 20, 1991); *Kogan & Moore Architects, Inc.,* 90-INA-466 (May 10, 1991).

Moreover, the report of contact received by the State Agency from applicant DeCosta (AF 48) indicates that he never received any calls from the Employer. Instead, he says he received a letter dated March 11, 1994, from a Jerry Esposito (AF 45) on letterhead for "Big Jerry's Pizzeria" at 63 Washington Street, Brooklyn, NY 11201. He states that when he called, he was advised that Mr. Esposito had not been at that address for six years. This is contrary to the Employer's statement that Mr. DeCosta returned his call on March 2, 1994. The letter is inconsistent with the Employer's assertion that Mr. DeCosta told him he was no longer interested in the job (presumably on March 2, 1994).

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[2] It should be noted that the Employer did not mention his attempt to contact Ms. Ber on February 16, 1994, until his Rebuttal submitted on June 13, 1994 (AF 69). Such attempt to contact Ms. Ber was never mentioned in the Employer's recruitment report (AF 40, 53), which indicated that his first contact with Ms. Ber was on February 23, 1994. According to *Yaron Development Co., Inc.,* 89-INA-17 (Apr. 19, 1991) (*en banc),* recruitment reports must indicate what attempts the employer made to contact applicants, and include such details as when or how many times it attempted to contact applicants.

[3] Even if the Employer had made this argument in his Rebuttal, this would not have been an acceptable justification for his delay. *Fantasy Travel Tours,* 93-INA-74 (Feb. 22, 1994) held that the fact that the employer did not understand its responsibility for promptly contacting applicants and that the state agency's letter was not clear in this regard, was not a credible excuse.

Therefore, we find that the Employer has not shown a good-faith recruitment effort due to his delay in contacting qualified U.S. applicants. Accordingly, we affirm the CO's denial of labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of December, 1996, for the Panel.

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.